APPENDIX.

WITHDRAWAL ORDER OF SEPTEMBER 27, 1909.

SEPTEMBER 27, 1909.

The honorable the SECRETARY OF THE INTERIOR.

SIR: In accordance with your orders I have the honor to submit the following recommendation, which covers approximately 3,041,000 acres, *of which the larger part is probably private land* and not affected by this withdrawal.

TEMPORARY PETROLEUM WITHDRAWAL NO. 5.

In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public-land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination.

[Here follow the descriptions of lands in Wyoming and California.]

Very respectfully,

(Sig.) H. C. RIZER,
Acting Director.

Approved September 27, 1909, and sent to General Land Office.

FRANK PIERCE,
Acting Secretary.

ECF.

21493—13——8

CORRESPONDENCE LEADING TO THE WITHDRAWAL ORDER OF SEPTEMBER 27, 1909.

FEBRUARY 24, 1908.

The honorable the SECRETARY OF THE INTERIOR,
Washington, D. C.

SIR: I have the honor to call your attention to page 15 (inclosed herewith) of the Daily Consular and Trade Report of the Department of Commerce and Labor of Saturday, February 15, 1908, which directs attention to the superiority of liquid fuels—that is, petroleum products in one or another form—on steamships, and also to the policy of the British Government in using such liquid fuels as emergency fuels in battleships; also to the editorial on page 3 of the Oil Industry of January 15, 1908.

It will be easy, if desired, to multiply the authoritative statements already in print concerning the superiority of liquid fuel for the Navy. For that reason I have to recommend that the filing of claims to oil lands in the State of California be suspended in order that the Government may continue ownership of valuable supplies of liquid fuel in this region where all fuel is expensive.

It is evident from the many reports on the superiority of liquid fuel that the question of its adoption is simply a question as to the price at which suitable petroleum products can be purchased.

The present rate at which the oil lands in California are being patented by private parties will make it impossible for the people of the United States to continue ownership of oil lands there more than a few months. After that the Government will be obliged to repurchase the very oil that it has practically given away.

The inadequacy of the coal supply on the Pacific coast is well known to every one who has made the subject of fuel a study. The local supply is derived entirely from a few mines on Puget Sound and one locality in eastern Washington. There are also some coal developments in Oregon, but no deposits here of a quality much above a lignite. In California the supply is limited to a small production of poor coal and coal briquettes about Mount Diablo, near San Francisco, and one mine in Monterey County, which is producing a small quantity of a fairly good bituminous which is not being marketed as yet, owing to poor transportation facilities. The great bulk of the coal used on the Pacific coast is obtained from our western inland fields or from Australia.

Regarding the petroleum supply, the production last year did not meet the requirements of the trade, and the reserve stock was drawn on to meet the demand. At present the rate of increase in demand is more rapid than the increase in production, and this, taken in connection with the great falling off in certain of the older fields, due to depletion of the sands and to flooding by water of sands which otherwise might be productive, shows how important is this matter of a conservation of the remaining supply.

Those areas in which the probabilities are greatest for striking commercial deposits of oil have nearly all been prospected with a drill and either proven or condemned. There are only a few areas of probable oil territory now remaining under governmental control, and these are rapidly being filed on and patented either through legitimate oil development or by subterfuge, over claims for gypsum,

etc. If anything is to be done regarding the matter, there is no question but that it should be done at once, for prospecting is now going on at an unprecedented rate throughout the West. All of the larger oil companies realize not only that the supply in the proven fields is limited, but that the area over which prospecting is liable to result favorably is also restricted.

Very respectfully,

GEO. OTIS SMITH, *Director.*

(Hearings held before the Committee on the Public Lands, H. R. 24070, May, 1910, p. 91.)

Director Smith's testimony, loc. cit., page 97, shows that a copy of the above letter was sent by him to Secretary Ballinger, with another letter of September 17, 1909, which is as follows:

The honorable the SECRETARY OF THE INTERIOR.

SIR: I have the honor to transmit herewith a copy of a letter addressed to your predecessor in February, 1908. The arguments presented in support of the recommendation made at that time are still valid, and they have been amplified in the survey's conservation report on the petroleum resources of the United States, a copy of which I submit herewith. In this report it is shown that the present production of petroleum exceeds the legitimate demands of the trade and that inasmuch as the disposal of the public petroleum lands at nominal prices simply encourages overproduction the logical method of checking this unnecessary waste would be to secure the enactment of legislation that would provide for the sane development of this important resource. In view of the well-known facts of the mode of occurrence of oil and the all too common

practice of drilling wells close to boundary lines of private holdings that are being developed for oil, conservation of the petroleum supply demands a law that will provide for disposal of the oil remaining in the public domain in terms of barrels of oil rather than of acres of land.

I have the honor to also call your attention to the estimate in the petroleum report that at least one-half pint of lubricating oil is used for every ton of coal converted into power, and that this quantity of lubricating oil represents over a half gallon of crude petroleum. Taking this into account, as well as the increasing use of fuel oil by the American Navy, there would appear to be an immediate necessity for assuring the conservation of a proper supply of petroleum for the Government's own use. I would therefore renew my recommendation that pending the enactment of adequate legislation on this subject the filing of claims to oil land in the State of California be suspended.

In this connection it is important to note that, acting on my report of June 4, 1909, classifying certain oil lands in California, the Commissioner of the General Land Office issued instructions to registers and receivers to withhold these oil lands from agricultural entry pending consideration of the question of legislation. The area of oil land affected by this action is about 427,000 acres, to at least 40 per cent of which the Government retains title. In several townships—notably T. 32 S., R. 22 E.; T. 32 S., R. 23 E.; T. 32 S., R. 21 E.; T. 31 S., R. 21 E.; T. 31 S., R. 23 E.; T. 31 S., R. 22 E.; T. 31 S., R. 24 E., of the Mount Diablo meridian, and in T. 11 N., R. 24 W., and T. 12 N., R. 25 W., of the San Bernardino meridian—there are compact areas of

unappropriated oil land, each including from 6 to 16 contiguous sections.

Very respectfully,

GEO. OTIS SMITH, *Director.*

(1b., 97.)

Upon receipt of these communications Secretary Ballinger addressed the following letter to the President, viz:

SEPTEMBER 17, 1909.

The PRESIDENT, *White House.*

SIR: I have the honor to bring to your attention the subject of the conservation of the petroleum resources of the public domain, with special reference to the present and future requirements of the American Navy.

The six largest battleships in commission or under construction are equipped for the use of either oil or coal, and the fourteen latest destroyers use oil exclusively.

The Geological Survey reports that the present rate of production of petroleum can not be maintained beyond a very few years, after which a marked decrease will result in an insufficient supply and increased prices. At present the production exceeds the legitimate demands of the trade, and inasmuch as the disposal of the public petroleum lands at nominal prices simply encourages overproduction the logical method of checking this unnecessary waste would be to secure the enactment of legislation that would provide for the sane development of this important resource. In view of the well-known facts of the mode of occurrence of oil and the all too common practice of drilling wells close to boundary lines of private holdings

that are being developed for oil, conservation of the petroleum supply demands a law that will provide for the disposal of the oil remaining in the public domain in terms of barrels of oil rather than of acres of land.

The Navy has a further interest in the conservation of the petroleum supply by reason of the absolutely necessary use of petroleum products for lubrication. A very conservative estimate is that at least one-half pint of lubricating oil is used for every ton of coal converted into power, and that this quantity of lubricating oil represents over a half gallon of crude petroleum.

The recommendation was made by the Director of the Geological Survey in February, 1908, to my predecessor that the filing of claims to oil land in the State of California be suspended in order that the Government may continue the ownership of a sufficient supply of petroleum on the Pacific coast, where other fuel is expensive. No action to this end has been taken.

Acting upon the survey's report of June 4, 1909, classifying oil lands in California, the Commissioner of the General Land Office on June 22, 1909, issued instructions to the registers and receivers to withhold these oil lands from agricultural entry pending consideration of the question of legislation. The area classified as oil land is 430,000 acres, to at least 40 per cent of which the Government still retains title. In several townships in this tract there are compact areas of unappropriated oil land, each including from 6 to 16 contiguous square miles.

As a result of previous work by the Geological Survey, similar action was taken in June, 1908, on

150,240 acres in California classified as oil land, the title to a considerable portion of which is believed to remain in the Government. Furthermore, there is at present withdrawn in California, pending examination and classification by the Geological Survey, which work is now in progress, approximately 1,650,000 acres, of which 1,250,000 acres are withdrawn from all entry.

The time appears opportune for legislative action that will assure the conservation of an adequate supply of petroleum for the Government's own needs. This legislation should give authority to fix the terms of disposition of public oil lands so as to provide for the future demands of the Navy and should also authorize the permanent reservation of such areas as the Executive, after full investigation, may find necessary for this Federal purpose. It is believed that such legislation would not interfere with the profitable development and utilization of the California oil pools.

In aid of such legislation and, indeed, as essential to the accomplishment of its purpose all the lands hereinbefore mentioned should be temporarily withdrawn from all forms of filing, entry, and disposal, including mineral entry. I have the honor to be,

Very respectfully,

R. A. BALLINGER,
Secretary.

(Ib., 98.)

Soon after the date of this letter, the Secretary and the Director conferred with President Taft at Salt Lake City (hearings before the Committee on Public Lands on H. R. 24070, p. 99), and thereupon,

on September 26, 1909, the Secretary wired to Acting Secretary Pierce:

> Have conferred with President respecting temporary withdrawals covering oil lands. If present withdrawals permit mining entries being made of such lands wish the withdrawals modified at once to prohibit such disposition pending legislation.

The withdrawal now in question was made on the following day. Acting Secretary Pierce telegraphed to Mr. Ballinger, in care of the President's special at Helena, as follows:

> Telegram 26th received. California and Wyoming petroleum withdrawals heretofore made permit mining locations. Following your direction I have temporarily withdrawn from all forms of location and entry 2,871,000 acres in California and 170,000 acres in Wyoming, all heretofore withdrawn for classification. My withdrawal prevents all forms of acquisition in future and holds the land in statu quo pending legislation.

It will be observed that the California and Wyoming lands were included in one and the same order.

REFERENCES TO REPORT OF SECRETARY OF THE INTERIOR AND PRESIDENTIAL MESSAGES.

In his report to Congress for the fiscal year 1909, submitted in the fall of that year, the Secretary of the Interior, after referring to the withdrawal order now in question, says (p. 11):

> I desire to call attention to the importance of asking Congress to authorize the Executive to reserve certain areas of these lands

> for the purpose of affording a supply of fuel oil *for the future use of the Navy,* and to make such regulations as may be necessary for the preservation and extraction of such deposits. No legislation exists for the entry of oil and gas lands, other than the general mining laws of the United States, which are not adaptable to the disposition of lands containing mineral oils and gas.

The President, in his message of January 14, 1910, spoke of the lax and prodigal manner in which the Government had been disposing of its public domain under the mining as well as other acts, of the great frauds which had been committed in the past, and of the " deep concern in the public mind respecting the preservation and proper use of our national resources." " This," he said, " has been particularly directed toward the conservation of the resources of the public domain. The problem is how to save and how to use, how to conserve and still develop." He classed among the noteworthy reforms of his predecessor the bringing to public attention to the necessity " for the enactment of laws amending the obsolete statutes so as to obtain governmental control over that part of the public domain in which there are valuable deposits of coal, of oil, and of phosphate." He then went on to elaborate upon the need of properly classifying the lands and disposing of the " treasure of coal, oil, asphaltum, natural gas, and phosphate contained therein " in such a way as to prevent monopolies and " to secure the governmental purpose and at the same time not frighten away the investment of the necessary capital."

In the President's message of December 6, 1910, he refers to and embodies an address which he made

before the National Conservation Congress at St. Paul on September 5 of that year. (See Appendix to Message.) In the address he said (p. 98):

> In the last administration there were withdrawn from agricultural entry 2,820,000 acres of supposed oil land in California; 1,451,520 acres in Louisiana, of which only 6,500 acres were known to be vacant unappropriated land; and 74,849 acres in Oregon, making a total of 4,346,369 acres. In September, 1909, I directed that all public oil lands, whether then withdrawn or not, should be withheld from disposition pending congressional action, *for the reason that the existing placer-mining law, although made applicable to deposits of this character, is not suitable to such lands, and for the further reason that it seemed desirable to reserve certain fuel-oil deposits for the use of the American Navy.* Accordingly, the form of all existing withdrawals was changed and new withdrawals aggregating 2,750,000 acres were made in Arizona, California, Colorado, New Mexico, Utah, and Wyoming. Field examinations during the year showed that of the original withdrawals 2,190,424 acres were not valuable for oil, and they were restored for agricultural entry. Meantime other withdrawals of public oil lands in these States were made, so that November 15, 1910, the outstanding withdrawals amounted to 4,654,000 acres.
>
> The needed oil and gas law is essentially a leasing law. In their natural occurrence, oil and gas can not be measured in terms of acres like coal, and it follows that exclusive title to these products can normally be secured only after they reach the surface. Oil should be disposed of as a commodity in terms of

barrels of transportable product rather than in acres of real estate. This is, of course, the reason for the practically universal adoption of the leasing system wherever oil land is in private ownership. The Government thus would not be entering on an experiment, but simply putting into effect a plan successfully operated in private contracts. Why should not the Government as a landowner deal directly with the oil producer rather than through the intervention of a middleman to whom the Government gives title to the land?

The principal underlying feature of such legislation should be the exercise of beneficial control rather than the collection of revenue. As not only the largest owner of oil lands, but *as a prospective large consumer of oil by reason of the increasing use of fuel oil by the Navy,* the Federal Government is directly concerned both in encouraging rational development and at the same time insuring the longest possible life to the oil supply. The royalty rates fixed by the Government should neither exceed nor fall below the current rates. But much more important than revenue is the enforcement of regulations to conserve the public interest so that the covenants of the lessees shall specifically safeguard oil fields against the penalties from careless drillings and of production in excess of transportation facilities or of market requirements.

One of the difficulties presented, especially in the California fields, is that the Southern Pacific Railroad owns every other section of land in the oil fields, and in those fields the oil seems to be in a common reservoir or series of reservoirs, communicating through the oil sands, so that the excessive drainage of oil at one well, or on the railroad territory

generally, would exhaust the oil in the Government land. Hence it is important that if the Government is to have its share of the oil it should begin the opening and development of wells on its own property.

In view of the joint ownership which the Government and the adjoining landowners like the Southern Pacific Railroad have in the oil reservoirs below the surface, it is a most interesting and intricate question, difficult of solution, but one which ought to address itself at once to the State lawmakers, how far the State legislature might impose appropriate restrictions to secure an equitable enjoyment of the common reservoir and to prevent waste and excessive drainage by the various owners having access to this reservoir.

It has been suggested, and I believe the suggestion to be a sound one, that permits be issued to a prospector for oil, giving him the right to prospect for two years over a certain tract of Government land for the discovery of oil, the right to be evidenced by a license for which he pays a small sum. When the oil is discovered, then he acquires title to a certain tract, much in the same way as he would acquire title under a mining law. Of course if the system of leasing is adopted, then he would be given the benefit of a lease upon terms like that above suggested. What has been said in respect to oil applies also to Government gas lands.

Under the proposed oil legislation, especially where the Government oil lands embrace an entire oil field, as in many cases, prospectors, operators, consumers, and the public can be benefited by the adoption of the leasing system. The prospector can be protected in the very expensive work that nec-

essarily antedates discovery; the operator can be protected against impairment of the productiveness of the wells which he has leased by reason of control of drilling and pumping of other wells too closely adjacent, or by the prevention of improper methods as employed by careless, ignorant, or irresponsible operators in the same field which result in the admission of water to the oil sands; while of course the consumer will profit by whatever benefits the prospector or operator receives in reducing the first cost of the oil.

RECOMMENDATION OF GENERAL BOARD OF NAVY, JANUARY 8, 1908.

No. G B 407 HP

[2nd endorsement.]

GENERAL BOARD, NAVY DEPARTMENT,
Washington, D. C., January 8, 1908.

(Subject: Liquid fuel; necessity of all new destroyers and torpedo vessels being fitted to burn liquid fuel only. Letter from Commander C. C. Marsh, U. S. N.)

Respectfully returned to the Navy Department.

2. The General Board is of opinion that the use of oil fuel both as an auxiliary in large ships and as the sole fuel of destroyers and smaller vessels would be attended with marked advantages, and has recommended in its building programs for the current and preceding years that vessels be fitted accordingly.

3. The General Board therefore recommends that the installation of oil-burning apparatus in vessels under construction be proceeded with as

promptly as the department may consider practicable.

GEORGE DEWEY,
Admiral of the Navy, President General Board.

LETTER OF ACTING SECRETARY OF THE NAVY, JUNE 25, 1912.

DEPARTMENT OF THE NAVY,
Washington, June 25, 1912.

SIR: There exists a situation seriously affecting this department's future policy in the powering of naval vessels, and in which the cooperation of the Department of the Interior is required.

Since the beginning of the American Navy, our vessels, ship for ship, have been superior to those of our enemies. To this largely our uniform success in naval warfare has been due. Naval ordnance, engineering, and construction have now become so standardized throughout the world, however, that it is difficult to maintain this superiority.

It is is now definitely determined, as a result of years of investigation, experiment, and development, that the use of oil as a fuel will render our vessels distinctly superior to the coal-burning vessels of other navies. Without any sacrifice in other features—guns, protection, or cruising radius—an oil-burning battleship can be given a speed about two knots greater than that of a coal-burning vessel. In a naval engagement this speed advantage would probably be a decisive factor.

Our position as an oil-producing nation should permit us to adopt this simple means of maintaining a superiority of type of vessels which is denied

to others, because no other important nation, except Russia, has an oil supply which is dependable in time of war.

In order to profit fully from the advantages of the liquid fuel, bunker spaces adjacent to the forerooms are omitted in an oil-burning vessel, the fuel being stowed in remote portions of the vessel which are unimportant for other uses. It is not practicable to convert such a vessel into a coal burner. It is manifest then that with our important naval vessels—oil burners—a failure of the supply might constitute a national calamity.

Therefore this department is unable to profit from the use of fuel oil to the extent of definitely adopting it for capital vessels until the certainty of a dependable supply, sufficient for the possible demands of war, has been established. This is estimated to be 500,000,000 barrels.

I am informed that there is in California, on public lands withdrawn from entry, oil estimated at four billion barrels. Were it definitely established that a sufficient quantity of this oil would remain in the ground there would be no occasion for the present concern of this department. It is understood, however, that until a sufficient quantity of the oil has been definitely reserved for the Navy there will always be a possibility of legislation permitting the removal of this oil under leases.

The demand for oil will, within the next few years, considerably increase. Already foreign nations are importing American oil for the purpose of building up artificial reserve supplies.

This department therefore earnestly requests the cooperation of the Department of the Interior to secure a definite reservation for the Navy, by Ex-

ecutive order, of oil-bearing public lands in California sufficient in extent to insure a supply of 500,000,000 barrels.

There are appended copies of correspondence on this subject under date of May, 1911.

Respectfully, yours,

BEEKMAN WINTHROP,
Acting Secretary of the Navy.

The honorable the SECRETARY OF THE INTERIOR.

REFERENCES TO LEGISLATION PENDING WHEN ORDER OF SEPTEMBER 27, 1909, WAS MADE AND INTRODUCED SOON AFTERWARDS.

Senate bill 438, 61st Congress, 1st session, introduced March 22, 1909, "To provide for the disposal of lands chiefly valuable for oil and asphaltum."

Repeals petroleum placer act and provides new method of location and purchase with restrictions on land and title acquired. Relates only to land in California.

Senate bill 597, 61st Congress, 1st session, introduced March 25, 1909, "Reserving from entry and sale the mineral rights to coal and other minerals mined for fuel, oil, gas, or asphalt, upon or underlying the public lands of the United States, and providing for the entry of the surface of public lands underlaid with or containing coal or other minerals mined for fuel, oil, gas, or asphalt, and providing for the leasing of the mineral rights in such lands."

Contains many sweeping provisions for public control.

House bill 9771, 61st Congress, 1st session, introduced May 17, 1909, "To provide for the disposal

of lands chiefly valuable for oil and asphaltum." Same as S. 438.

House bill 9964, 61st Congress, 1st session, introduced May 20, 1909, "To provide for the disposal of lands chiefly valuable for oil and asphaltum." Similar to H. R. 9771.

Senate bill 2623, 61st Congress, 1st session, introduced June 16, 1909, "To provide for the disposal of land chiefly valuable for oil."

Repeals old law and substitutes new procedure with certain restrictions.

Senate bill 4733, 61st Congress, 2nd session, introduced January 5, 1910, "Providing for the classification, care, and disposal of the public lands of the United States."

Gives express authority of withdrawal and provides that oil deposits shall not be sold, but may be leased.

Senate bill 5485, introduced January 18, 1910, "To authorize the Secretary of the Interior to make temporary withdrawals of areas of public land pending report and recommendation to Congress, or for examination and classification."

Senate bill 5488, introduced January 18, 1910, "To authorize the disposal of phosphate, oil, asphaltum, or natural gas."

Reserves all oil lands and provides method of leasing with careful limitations and restrictions.

House bill 22631, introduced March 9, 1910, "Providing for the classification, care, and disposal of the public lands of the United States." Same as S. 4733.

House bill 23382, introduced March 23, 1910, "To provide for the classification of the public lands of the United States."

House bill 23428, introduced March 24, 1910, "To authorize the President of the United States to make withdrawals of areas of public lands pending report and recommendation to Congress, or for examination and classification."

House bill 23699, introduced March 29, 1910, "To provide for the classification of the public lands of the United States."

House bill 23700, introduced March 29, 1910, "To authorize the disposal of phosphate, oil, asphaltum, or natural gas." Similar to S. 5488.

House bill 23703, introduced March 29, 1910, "To authorize the President of the United States to make withdrawals of public lands in certain cases."

House bill 23704, introduced March 29, 1910, "To authorize the President of the United States to make withdrawals of such areas of public land for classification and other purposes pending report and recommendation to Congress."

House bill 23909, introduced April 1, 1910, "To authorize the President of the United States to make withdrawals of areas of public lands for classification and for other purposes, to require reports to be made to Congress of withdrawals heretofore made and hereafter to be made, and to provide for the classification of land heretofore withdrawn or that may hereafter be withdrawn."

House bill 23914, introduced April 1, 1910, "To authorize withdrawals and provide for classification of public lands."

House bill 23915, introduced April 1, 1910, "To authorize withdrawals and provide for classification of public lands."

Senate bill 7587, introduced April 4, 1910, "To provide for the granting by the Secretary of the Interior of permits to explore and prospect for oil and gas on unappropriated and withdrawn lands," Contains limitations and restrictions as to permits and provides that no right to the acquisition of oil land shall be initiated otherwise.

House bill 24011, introduced April 4, 1910, "To authorize the President of the United States to make withdrawals of public lands in certain cases."

House bill 24070, introduced April 5, 1910, "To authorize the President of the United States to make withdrawals of public lands in certain cases," as amended, this became the act of June 25, 1910.

Senate bill 7726, introduced April 14, 1910, "To authorize the President of the United States to make withdrawals of public lands in certain cases."

Senate bill 7795, introduced April 18, 1910, "To authorize the President to make withdrawals of areas of public land."

ACT OF JUNE 25, 1910 (36 STAT., 847).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall

remain in force until revoked by him or by an Act of Congress.

SEC. 2. That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates: *Provided*, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: *And provided further*, That this Act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this Act: *And provided further*, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: *And provided further*, That hereafter no forest reserve shall be created, nor shall any additions be made to one

heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress.

SEC. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

REFERENCES TO LEGISLATIVE PROCEEDINGS ATTENDING PASSAGE OF THE ACT OF JUNE 25, 1910, AND REPORT OF SENATE COMMITTEE.

The act of June 25, 1910, originated in the House of Representatives in the so-called "Pickett bill," H. R. 24070. Prior to the hearings on this bill (begun on May 13, 1910) there had previously been a report by the Senate Committee on Public Lands on the somewhat similar Senate bill, S. 5485. Later the House bill was substituted in the Senate for 5485, and was favorably reported in the House and Senate. The majority of the Senate Committee on Public Lands, and apparently a majority of the Senate, were of the opinion that the bill was unnecessary to give the President the power of withdrawal, but in view of the President's insistence and the advisability of limiting the power, favored the passage of the bill. In reporting the bill the chairman of the committee (Nelson) states:

> But, Mr. President, as I have already stated, while in my opinion the President has this power and even greater power than is conferred in this bill, I think it is a good plan, in view of the experiences we have had in recent years, that we put this power in direct and express statutory form, rather than the common law of the courts, and *limit it as*

> *we propose to do in the bill.* The administration is satisfied with it, and while I think it limits the power of the executive department as it has it to-day under the interpretation of the courts, yet if the administration charged with the disposal and the management of our public lands is satisfied with this legislation, I am ready to support it, and I am willing that such a law should be enacted. (P. 7475, Cong. Rec., vol. 265, 1910.)

A minority was not wholly in accord with the majority, and submitted a report in part as follows:

> But while this minority is unable to agree that the Executive has present power to withdraw lands generally from the operation of the land laws without express or implied authority from Congress, it still believes that with proper limitations that authority should be conferred; therefore, it stands upon the recommendation that this bill should be passed with the following amendments:
>
> *First.* Such an amendment as would agree to the withdrawal for "public purposes" in such manner as would construe "public purposes" to be purposes for governmental use, and,
>
> *Second.* That such withdrawals should automatically cease with the expiration of the Congress to which they should be reported. (Cong. Rec., 1910, p. 7548.)

Thereupon, the following proceedings occurred (continuing):

> The PRESIDING OFFICER. The question is on the amendment of the Senator from Wyoming [Mr. Clark].
>
> Mr. NELSON. Mr. President, the adoption of the amendment proposed by the Senator from Wyoming [Mr. Clark] would, to my

mind, be utterly destructive to the entire bill. It would repeal a power that now exists in the President. * * *

(The amendment was defeated.)

[Senate Report No. 171, 61st Congress, 2d session.]

TEMPORARY WITHDRAWALS OF CERTAIN PUBLIC LANDS.

FEBRUARY 3, 1910.—Ordered to be printed.

Mr. NELSON, from the Committee on Public Lands, submitted the following report, to accompany S. 5485:

The Committee on Public Lands, to whom was referred the bill (S. 5485) to authorize the Secretary of the Interior to make temporary withdrawals of areas of public land pending report and recommendation to Congress, or for examination and classification, having had the same under consideration, report it back recommending passage of the following amendment as a substitute for the entire bill. Strike out all after the enacting clause and insert the following:

> That the President may, at any time in his discretion, withdraw from settlement, location, sale, or entry, any of the public lands of the United States and reserve the same for forestry, water-power sites, irrigation, classification of lands, or other public purposes, to be specified in the orders of withdrawals, and such withdrawals and reservations shall remain in force until revoked by him or by an act of Congress. The Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

The power conferred upon the President by the proposed substitute is a power that he has possessed and exercised almost from the inception of our public-land system and is a power that he still possesses and exercises.

The power of the President to reserve public lands from sale and entry rests upon various statutes, upon numerous decisions of the courts, and upon long-established and long-recognized usage.

The preemption act of 1830 (4 Stat., 421) provided that the privilege of preemption should not extend to any land "which is reserved from sale by act of Congress or by order of the President." This clearly gives the President the power, on his own motion, to make the reservation and leaves it in his discretion to exercise the power, and the power may be exercised through an executive department. In such cases it is deemed the act of the President.

In the case of *Wilcox* v. *Jackson* (13 Peters, 498) the reservation was made by the Commissioner of the General Land Office upon the request of the Secretary of War. This was held to be valid and to be the act of the President. (See p. 513.) In the case of the *United States* v. *Stone* (2 Wall., 525) this view is sustained.

The general preemption law of 1841 (5 Stat., 456), which remained in force until 1891—about fifty years in all—provided that—

> no lands included in any reservation by any treaty, law, or proclamation of the President * * * shall be liable to entry under * * * the provisions of this act.

In the Des Moines land-grant act (11 Stat., 9) the reservation covered land—

> reserved * * * by any act of Congress or in any other manner by competent authority for * * * aiding in internal improvements, or any other object whatsoever.

The reservation in this case was made in the first instance by the Secretary of the Treasury while he had charge of the public lands, and afterwards by the Secretary of the Interior after the public lands were placed under his jurisdiction; and the reservation made by these officials was held to be the act of the President and to be done by "competent authority." (*Wolcott* v. *Des Moines,* 5 Wall., 681.)

In the act providing for the survey of public lands in California (10 Stat., 246) are found the words "or reserved by competent authority," and this "authority" is held to be the President. (*Grisar* v. *McDowell,* 6 Wall., 363.)

In the case of *Grisar* v. *McDowell,* cited above, the point was raised that no reservation could be made except under a direct sanction of an act of Congress, and that the President did not possess the power to make such reservation. In reply to this objection the Supreme Court makes the following response:

> But, further than this, from an early period in the history of the Government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.
>
> The authority of the President in this respect is recognized in numerous acts of Con-

gress. Thus, in the preemption act of May 29, 1830, it is provided that the right of preemption contemplated by the act shall not "extend to any land which is reserved from sale by act of Congress, or by order of the President, or which may have been appropriated for any purpose whatever." Again, in the preemption act of September 4, 1841, "lands included in any reservation by any treaty, law, or proclamation of the President of the United States, or reserved for salines or for other purposes," are exempted from entry under this act. So by the act of March 3, 1853, providing for the survey of public lands in California, and extending the preemption system to them, it is declared that all public lands in that State shall be subject to preemption, and offered at public sale, with certain specific exceptions, and, among others, "of lands appropriated under the authority of this act, or reserved by competent authority." The provisions in the acts of 1830 and 1841 show very clearly that by "competent authority" is meant the authority of the President and officers acting under his directions.

Attorney General Miller, in an opinion delivered by him (19 Op. Attys. Gen., 373), declared, when it was objected that certain statutes cited did not authorize the reservation in question to be made:

> To this I answer that in my opinion the validity of the Executive order of August 5, 1878, and that of February 19, 1877, to which it was supplemental, rest not on that statute, but on a long-established and long-recognized power in the President to withhold from sale or settlement, at discretion, such parts of the national domain, open to entry and settlement, as he may deem proper.

While no express or direct statutory power has been given the President to create Indian reservations by mere Executive orders, yet such power has been repeatedly expressed by the President, and it has been held that such power has been rightfully and lawfully exercised. (See opinion of Attorney General Brewster, 17 Op. Attys. Gen., p. 258.) In this opinion are cited many instances of the creation of Indian reservations by Executive orders.

The case of the *United States* v. *Payne* (2 McCrary's Circuit Court Reports, 289) is in harmony with and upholds the power of the President in such cases.

In the matter of our mining laws, section 2319 of the Revised Statutes of the United States provides that—

> all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase and the lands in which they are found to occupation and purchase. * * *

In the case of *Gibson* v. *Anderson* (United States Circuit Court of Appeals Report, vol. 65, 277) it was held that the proclamation of the President reserving certain lands for the use of the Indians had the effect of withdrawing the land reserved from the operation of the mining law quoted above. The court declares (p. 288):

> There can be no doubt that such reservation by proclamation of the Executive stands upon the same plane as a reservation made by treaty or by act of Congress.

The Executive power of making reservations, conferred by the preemption law of 1841 also inheres and appertains to the homestead law.

Section 2289 of the Revised Statutes of the United States provides that—

> every person * * * shall be entitled to enter one quarter section or a less quantity of unappropriated public lands, upon which such person may have filed a preemption claim, or which may, at the time the application is made, be subject to preemption at one dollar and twenty-five cents per acre; or eighty acres or less * * * at two dollars and fifty cents per acre.

This section, in effect, excludes from the operation of the homestead law the same class of lands that were excluded from the operation of the preemption law of 1841, to wit, " lands included in any reservation by any treaty, law, or proclamation of the President for any purpose "; so that the President has the same power of making reservation in the case of land subject to homestead entry as he had in the case of lands subject to preemption entry.

The phrase " public lands," found in our various land laws, is used in our legislation to describe such lands as are subject to sale or other disposition under general law and not to lands that have been reserved by treaty, act of Congress, or Executive proclamation. (*Newhall* v. *Sanger*, 92 U. S., 761.)

The timber-culture laws of 1874 and 1878, which remained in force until 1891, were limited to " public lands of the United States "; in other words, that law did not allow other than " public lands " to be secured under it, and lands reserved by the

President by proclamation or Executive order were not such "public lands."

The timber and stone act of 1878 only applied to "unappropriated, uninhabited, and unreserved nonmineral land of the United States * * *."

See also the following cases in support of the Executive power of withdrawal and reservation: *Wolsey* v. *Chapman,* 101 U. S., 755; *Spencer* v. *McDougal,* 159 U. S., 62.

The statutes cited, as well as the decisions of the court above referred to, and other decisions that might be cited, as well as the opinions of the Attorneys General, all go to show that the President of the United States has the inherent power to reserve for public purposes lands of the United States from location, sale, or entry.

It is only lately that this power has been doubted and questioned, and the object of the proposed substitute is to make it definite and clear beyond all dispute that the President possesses this power of withdrawal. The only change in existing law, as interpreted by the courts, is that part of the proposed substitute which provides that the "Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of withdrawals."

INDEX.

CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES
v.
THE MIDWEST OIL COMPANY ET AL. } No. 750.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

The objective of the argument contained in the defendants' brief is to bring the President's order into fatal hostility with the mining law. To achieve this result the brief undertakes to place upon both the order and the law constructions which are obviously untenable, and have, for the most part, been anticipated in our opening brief. There is a studied effort by this means to picture the President's act as an act of usurpation, and to portray this case as one involving a serious dispute concerning the constitutional boundary between the executive and legislative powers. We agree with the defendants' conclusion that the case is very important, and we do not believe that the true reason for its importance will be

obscured by this process of constructing and destroying a man of straw. No such constitutional question as the defendants have fashioned is here involved. If it be true that the order is inconsistent with the purposes of Congress, as they may be gathered from the mining law and other sources, the reservation falls, and there is no room for further argument.

I.

Regarding the mining law.

The defendants, in effect, attribute to the mining law a purpose to dedicate all the public mineral lands in the United States to private acquisition. They treat it as though it evidenced an intention of Congress that every foot of such land should be devoted to this purpose and none other. Their idea seems to be that every parcel has been acted upon by the legislative will and appropriated as effectively as though it had been specifically described and set apart by the statute. This theory is so clearly untenable that we see no occasion to add to what has been said on the subject in our opening brief, pp. 17, 18, 67, 97. There is no more reason for saying that the mining law affected the status of mineral lands than for saying that the preemption and homestead laws affected the status of agricultural lands. Not one of these acts, nor any of the other general land laws, imports an intention of Congress to reserve or segregate or alter the status of any land. Their effect is merely to confer new privileges to select and acquire parcels out of the mass of public

land. They make it possible for an individual to become the grantee of a small part of that which the Government owns, but they do not guarantee that there will be lands for him to select, they do not affect the Government ownership of the lands which he does not select, and they do not operate in the slightest degree to diminish the public necessities or alter the public relations in respect of those lands.

We confess our inability to grasp the pertinency of that part of the opposing brief (pp. 110–130), which seeks to draw a distinction between agricultural and mineral lands in respect of the President's authority to appropriate for public purposes. It is perfectly true, as counsel point out, that before 1866 all mineral lands were reserved from disposition. It is equally true that the reason for this general reservation was that the minerals were regarded as peculiarly important to the public. In a generic sense they were reserved for public purposes. Hence, if an occasion arose to devote any part of them to public use, no order of withdrawal was necessary. But since the general mining law has conferred upon private persons the privilege of acquiring lands of this kind, some form of official action is required to segregate those portions which are demanded by the public needs. The public mineral lands are quite as much affected by the public interest as the public agricultural lands, and it would seem plain beyond controversy that if the President is a proper agent of the Government to reserve the latter, he may reserve the former also.

II.

Regarding the purposes of the reservation.

1. The broad question of the President's authority to withdraw land from the operation of the general land laws solely because those laws, contrary to the anticipation of Congress, are operating in ways injurious to the public interests, is not necessarily involved in this case. It may possibly be the sole question involved in cases which may arise in the future concerning land embraced in some of the extensive withdrawals (mentioned by President Taft in his messages of January 14, and December 6, 1910) of land containing phosphate deposits, water-power sites, etc. This undoubtedly was the question that the President had in mind when he used the language quoted on page 126 of the defendants' brief, and the language quoted on pages 65 and 66 of ours. We shall have something to say upon this question further on.

2. In this case there was the entirely distinct purpose of supplying a definite public use, to wit, fuel for the Navy. The purpose was to be achieved in two ways. First, by selecting and segregating specific lands for that use alone, and, second, through public control over the use of the remaining lands not so segregated. This purpose permeated the entire reservation, and the fact (if it were such) that there was a collateral purpose which, standing alone, would have been insufficient or objectionable, could not be invoked to defeat the reservation.

3. Even if there were a doubt regarding the purpose, the doubt should be resolved in support of the withdrawal. If the naval purpose be necessary to sustain the President's action, it must be presumed that he acted for that purpose, in the absence of the clearest possible showing that he acted exclusively for another, and unauthorized purpose. It would be an extraordinary thing, flying in the face of one of the clearest and most salutary rules of law, if this reservation, made for the public protection, the importance of which to the public can scarcely be overestimated, should be declared void upon a mere doubt, and in the absence of a complete demonstration that its object was unlawful.

4. But there is no doubt. The order was the immediate outcome of a recommendation based particularly and entirely upon the naval need. We have the President's own word, in a message to Congress, that this purpose was involved. As the defendants point out in their brief, a part of the lands have since been examined and set apart specifically for the Navy, and there is no reason to suppose that other parts will not be similarly designated in the future if, as is more than likely, these special reservations shall turn out to be inadequate, when the character of the lands, the state of the title, and the measure of the naval necessity are better known.

As a contradiction of the naval purpose, much stress is laid by defendants' counsel upon the fact that *all* of the supposed oil lands were reserved. The reservation now in question did not reserve all; but what

if it did? If the temporary reservation of all was found necessary, then all could be reserved. If there were only one township of public oil land remaining, would the President be precluded because there was no more? If he may reserve one acre may he not reserve a thousand, or a million if necessity requires? The defendants seem to feel that the authority to satisfy the public need is limited by some principle of equitable apportionment between the Government and the private locator.

There is a strong tendency in the defendants' brief to overrate the magnitude of the area reserved. The figures which the defendants quote represent the total areas of the townships and subdivisions specified in the orders of reservation, whereas it is only upon the public lands within those descriptions that such orders profess to operate. Thus in the letter of the Acting Director of the Geological Survey which embodies the order of September 27, 1909 (Brief, p. 107), it is stated that the order "covers approximately 3,041,000 acres, of which the *larger part* is probably *private land*, and not affected by this withdrawal." In spite of the common practice of confounding the acreages described with the acreages of public land withdrawn, it is a fact easy of verification that generally if not always there is a large percentage of land included which is in private ownership or subject to private claims. This would be especially true of mineral lands, since mining claims prior to application for patent are not of record in any Federal office, and the conditions under which the orders must be prepared

necessarily preclude a preliminary examination on the ground concerning the state of the title. It is safe to say in regard to this order, that there was not, and even now is not, definite information as to the quantity of public land affected; that there was not, and is not, any certainty as to the quantity or availability of the oil in the lands which were public; and that the proximity of private holdings renders problematical how much of that quantity, if known, would be liable to be lost to the Government through private operations. The problem being to preserve an adequate—which means an immense—supply of naval fuel against necessities and emergencies of the future, it will readily be seen how the uncertainties besetting the entire situation required a broad extension of the reservation.

It will be borne in mind that while the ultimate purpose was definite the reservation as made was preliminary in character. Its immediate purpose was to protect the status of the lands until, with more definite information, the precise areas required for the public use could be ascertained and defined. The remaining lands could then be disposed of under the existing law or in such other ways as Congress might provide. Congress approved the plan by the act of June 25, 1910, and the President has since proceeded with its execution to the extent of designating the two special naval reserves in California. But this does not mean that the lands thus designated, even when relieved from intrusions like the one

attacked by the bill in the case, contain all the oil which the Navy will require, or that the deposits which they do contain will be secure against drainage through lands adjacent. Neither does it indicate that the actual needs of the Navy have been definitely and finally computed.

Upon the whole we can not see that there is even plausibility in the argument that because the order was aimed to include all the vacant lands then believed to contain valuable deposits of oil, therefore it must be understood as having overshot the naval purpose. This argument, if legitimate under any circumstances, is certainly worthless in the absence of any showing that both the naval requirements, and the identity of public oil lands containing a supply of oil (not subject to be endangered by private operations), sufficient in quantity and quality, and of suitable location, were known when the reservation was made.

III.

No distinction can be made between the lands in Wyoming and the lands in California in respect of the purposes of the order of withdrawal.

The lands are all included in the order without any distinction whatever. Though far from the Pacific, the Wyoming lands are so much the nearer to the Atlantic seaboard. The California lands are much more accessible from the sea, and for that very reason would be the more liable to capture by a hostile force, while the Wyoming lands are fully protected by their remoteness.

It is true (as the defendants say in their brief, p. 28) that Wyoming lands had been previously withdrawn from agricultural entry pending examination of their character, and were left free for exploration and purchase under the mineral law, but this is also true of lands in California. See our principal brief, pp. 51 (bottom), 52 (top), 113, 115, 117; Bulletin 537, U. S. G. S., p. 38.

In their endeavor to establish a distinction, the defendants rely very largely upon the fact that the recommendation of the Secretary and the Director referred to California lands, and that the President in a part of his message of December 6, 1910 (Government's brief, p. 117; defendants' brief, p. 12), spoke of his purpose "to reserve certain deposits for the use of the American Navy." Undoubtedly the President's intention was that ultimately certain definite areas out of the whole quantity reserved should be selected and set apart for the naval use—a plan which could not be carried out until after a careful examination of the lands and the state of the title had been made, nor until the probable needs of the Navy had been ascertained. This sufficiently explains his use of the expression "certain deposits." The mention of California lands only, in the letters recommending the withdrawal, is evidence that those lands were first in the minds of the officials who wrote the letters, and may be taken also as evidence that they were prominent in the mind of the President when he acted upon their recommendation. But it is *not* evidence

that, to the mind of anyone, the Wyoming lands were not desirable for the naval purpose, and it can not be relied on to overcome the natural inference that all of the lands included in the one order were intended to be reserved for the same purpose.

There is an intimation in the defendants' brief (p. 28) that the Wyoming lands were included without the President's knowledge. The documents affirmatively disprove this. The Acting Secretary who signed the order telegraphed immediately to the Secretary, who was then with the President, as follows:

> Telegram 26th received. California and Wyoming petroleum withdrawals heretofore made permit mining locations. Following your direction I have temporarily withdrawn from all forms of location and entry 2,871,000 acres in California and 170,000 acres in Wyoming, all heretofore withdrawn for classification. My withdrawal prevents all forms of acquisition in future and holds the land in statu quo pending legislation.

See Government's principal brief, p. 115.

It is only by conjecture that any distinction can be drawn between the purpose of the reservation in California and its purpose in Wyoming. We submit that there is no warrant for attacking it piecemeal in this way, and that, being a single legal entity, the reservation must stand or fall as such.

IV.

The authority of the President may be reasonably implied from his statutory duties concerning the Navy.

Section 417 of the Revised Statutes, taken from the act of April 30, 1798 (1 Stat. 553), which established the Department of the Navy, provides:

> The Secretary of the Navy shall execute such orders as he shall receive from the President relative to the procurement of naval stores and materials, and the construction, armament, equipment, and employment of vessels of war, as well as all other matters connected with the Naval Establishment.

Section 1552 provides:

> The Secretary of the Navy may establish, at such places as he may deem necessary, suitable depots of coal, *and other fuel*, for the supply of steamships of war.

The Executive is expressly required by law to keep naval vessels in service in time of peace (R. S. sec. 1534), and of course there can be no question that, so far as the means at his command will permit, it is his duty to keep the Navy as a whole in a state of preparation for the emergencies of war. The laws which provide for the construction of new vessels leave the selection of the fuel and machinery that shall move them to the executive discretion. (See 36 Stat. 628, 1287; 35 Stat. 158, 777; 34 Stat. 582, 1203; 24 Stat. 215.) The acts appropriating money to enable the Secretary to establish depots

according to R. S. section 1552, *supra*, and to purchase fuel for regular use, expressly authorize the procurement of "coal *and other fuel.*" (See 35 Stat. ch. 255, p. 761.) Without doubt, then, it lies within the executive authority to adopt oil as the naval fuel, and without doubt it is a matter of executive duty to substitute oil for coal if that course will conduce to the greater efficiency of the Navy. It is the duty of the executive to select the fuel, to select the best fuel, and to see that it is provided and kept in readiness in sufficient stock to satisfy present needs and to guard against future emergencies.

If the fuel is to be purchased, it is the executive duty to make use of the moneys which Congress has appropriated, and to inform Congress of the amounts of money which will be needed in addition. But it would be an unnecessary and exceedingly narrow and injurious view of the whole executive duty to hold that because Congress has customarily appropriated, and will appropriate, sufficient money to buy, therefore the executive function is that of a mere purchasing agent for Congress. If the best quality of fuel—the quality best suited to render our warships equal or superior to the ships of other powers—be found only in the public domain, or if, by reason of a combination of physical and economic conditions, it be there, and only there, that a supply can be found and controlled, sufficient as an insurance against a dangerous and perhaps fatal shortage in the future—is it possible to say that no duty arises and rests upon

the Executive in consequence of the legislation we have mentioned? The only question that can exist here respects the nature and extent of the duty, not its existence. The duty must be measured by what is necessary or reasonable in fulfilling the spirit of the statutes which impose it. The effect of those statutes is to put the Executive under a trust to be constantly informed of what is and will be needed in the way of fuel, to provide it in proper quantity, quality, and location, if the means at his command will allow, and to request additional assistance from Congress when they will not. Now, if the only safe and adequate supply is found in the public lands and therefore already in Government ownership, it is manifestly the duty of the Executive, if it has not the authority to appropriate the deposits directly, to inform Congress of the facts and request the authority. Not to do so would be a dereliction of the trust. The duty to do so arises not only from the constitutional duty to keep Congress informed of the "state of the Nation," but it springs also, immediately, from the statutes. But if, by reason of the circumstance that they have not been reserved from the general laws, the lands, or material portions of them, are in imminent danger of passing into private control and the fuel deposits exploited and exhausted, it can hardly be imagined that the full duty would be performed by merely laying the facts before Congress. A tentative reservation or appropriation of the lands, either by taking actual possession of them or by an equivalent proclamation or other official act, would be the only course meet for

the situation. The power to take that course is therefore fairly and reasonably to be implied from the statutes which we have mentioned, for if any power is to be implied from them, it must be a power commensurate with all their purposes.

We have not contended for an unlimited authority to make immediate use of oil deposits or permanently reserve them for future use without reference to congressional action. The proposition that such a power exists goes far beyond what is necessary to sustain the reservation actually made, and we have not thought it necessary to establish the greater in order to maintain the less. We submit, however, that the authority of the Executive to make use of the natural products of the public domain in certain contingencies may not seriously be denied. If a revenue cutter or other public vessel were to run short of fuel, would any one question the right of her officers, in the absence of any other resource, to lay in a supply of coal or wood, if such were to be found accessible, from public lands? If fuel were needed for troops stationed in quarters remote from any market, the use of public coal or public trees would be upheld as a matter of course. In fact it has been more or less customary for the President to reserve both coal and timber lands for military uses in the West, although Congress has never expressly authorized even the use under necessity, much less the making of reservations for future necessities.

On principle, no line can be drawn between an appropriation to meet a necessity for immediate use and an appropriation to meet a necessity for a future use. In the one case it is necessary to use now; in the other it is necessary to hold now for a use which will be required hereafter. If an actual use be justified as an incident to the present performance of an executive duty, an actual holding and preservation must be justified as an incident to the future performance of an executive duty. To illustrate: First, if the President has sent troops to a remote locality where the only means of obtaining fuel consists in a resort to wood or coal on public land, the duty of maintaining them there carries with it the right to take possession of that fuel and use it. Secondly, if he finds that he must send troops there at some time in the future, and that there is an immediate danger that the fuel will pass into the control of private interests, so that an adequate supply may not be available for the troops when they reach their destination, his duty to send the troops there and maintain them carries with it the right to take possession of the fuel and hold it, or protect it by an executive order, which amounts to the same thing. There is no violence in these implications. The fuel is public property and the highest use of which it is susceptible is the public use.

Neither is it practicable to draw a judicial boundary between good and bad reservations, based on a judicial estimate of necessity. The question whether

a necessity for use can or will exist is certainly a question to be settled by the Executive and by Congress. Here the judgment of the Executive, though it does not control Congress, concludes the courts. And however remote the time of use may appear, the fact can not escape that instant reservation may be imperative to make the use possible when that time arrives.

V.

The authority of the President to make permanent reservations for immediate or future occupation by the military forces—an authority which certainly must be conceded in spite of the defendants' assertions to the contrary—is no more readily to be derived by implication from the President's duties respecting the Army than is the authority in controversy to be derived from his duties respecting the Navy.

The President, in his discretion, should move troops to the places where their services are needed, and quarter them in convenient localities; but the duty to do these things produces no imperious necessity for withdrawing public land for permanent reservations. It would be *possible* to wait, and request Congress to reserve public land or acquire private land by purchase or condemnation.

It is no more the President's duty to provide land for military posts and forts than to provide fuel for the Navy. In both cases it is plainly his duty to consider the future as well as the present and the demands of war no less than the demands of peace. In each case alike it is open to him to request Congress to appropriate public land or to appropriate public

money to buy or condemn private land. In legal principle, therefore, the two cases do not differ in any respect. If the circumstances may warrant a temporary executive reservation in the one case, they will in the other. The only differences of quality that may be suggested between the customary military reservation and the reservation with which we are now concerned are these: The military reservation, sustained by precedent and authority, contemplates immediate and protracted use, without waiting for Congress to approve, and its primary purpose respects the occupancy of the land rather than the consumption of its products, whereas the present reservation is tentative, expressly subject to the approval of Congress, and its ultimate purpose respects the use of a natural product. Thus it will be seen that, in one way, the military reservation goes much farther—assumes far more—than the naval reservation. The other distinction, found in the nature of the contemplated use, is wholly immaterial in view of the express subjection of the naval reservation to the scrutiny and action of Congress.

In so far, then, as the two kinds of reservations rest upon implications to be derived from the executive duties growing out of the statutes relating to the military and naval establishments, a military reservation is no more clearly sustainable than the reservation here in question. In truth, this reservation may be more readily justified because of the unique importance of its purpose and the difficulty or impossibility of finding an equivalent.

VI.

Relations of the reservation to the Executive practice and congressional recognition.

1. The defendants assume (*a*) that the only phases of the practice to be considered are those which occurred many years ago, and (*b*) that affirmative action by Congress can alone give evidence of congressional recognition. We take issue upon both of these propositions.

(*a*) Antiquity is not the only touchstone. The numerous instances of executive withdrawals made for a wide variety of purposes during the last ten years (Brief, pp. 51–55), are not to be ignored as evidence of the scope of the Presidential authority. We have shown that a number of these were subsequently recognized by Congress. An agent's implied authority widens as his acts extend, with the knowledge of his principal. Congress knew of all of these withdrawals through the reports of the Land Department. In no instance did it disapprove. The implication of consent is inevitable.

(*b*) When such acts of the Executive are repeatedly performed with the knowledge of Congress, the assent of Congress may be inferred from its silent acquiescence. (See Brief, p. 56 *et seq.*) There is no objection to deriving an executive authority by inference in this way, whether it be in aid of a statutory authority already existing, or independent of statute. Legislation, in the strict sense, may require some formal expression of the legislative will. But as we have seen (Brief, p. 18), the dispositions

by Congress concerning the public domain, especially the mere reservation of land in the public interest, do not involve legislation in that sense. If they did, the power to make such dispositions could not be delegated (Brief, p. 95). Any disposition or use of the public domain is lawful if Congress consents. The consent may be and usually is expressed in the form of a law, but the mere expression of it, whether formal or informal, is not in essence legislation. It is an expression by an owner of his will concerning his property, rather than the act of a lawmaker laying down a rule to govern the conduct of its subjects. Consequently, valuable rights and privileges in the public lands, which without the consent of Congress could not exist, have been held by this court to have passed to private individuals as the result of the notorious exercise thereof without congressional interference.

Thus, in *Buford* v. *Houtz*, 133 U. S. 320, in view of the long use, and the absence of any governmental prohibition, this court implied a license in the public to depasture the public lands. On page 326 of the opinion it is said:

> The Government of the United States, in all its branches, has known of this use, has never forbidden it, nor taken any steps to arrest it. No doubt it may be safely stated that this has been done with the consent of all branches of the government, and, as we shall attempt to show, with its direct encouragement.

Even the general rights to appropriate the public mineral land and minerals, and the water from the public streams, were conferred through the mere acquiescence of Congress, implied from its knowledge and its silence.

In *Atchison* v. *Peterson*, 20 Wall. 507, 512, the court said:

> The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and, to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement.

See *Basey* v. *Gallagher*, *id.* 670.

In *Broder* v. *Water Company*, 101 U. S. 274, it was held that a right of way for a canal, dependent upon mere use, was not affected by a grant of part of the land over which it passed by the amended Central Pacific Railroad act of July 2, 1864. The opinion assumes that title to the land passed to the plaintiff under that act, recognizes that there was no act of Congress to confer the right of way before the act of July 26, 1866, but holds the right of way superior upon the ground that it became vested by governmental acquiescence before the railway grant occurred. Mr. Justice Miller observed (p. 276):

> It is the esstablished doctrine of this court that rights of miners, who had taken possession of mines aand worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining opera-

> tions and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary *recognition of a preexisting right of possession*, constituting a valid claim to its continued use, than the establishment of a new one.

If vested rights may accrue to individuals in this way, through the silence of Congress, may not an authority be deemed to accrue, in the same way, to the President of the United States to reserve public lands temporarily in the public interest?

2. When one considers the wide variety of purposes to which the practice has extended, and the frequency of its exercise, always with the silent assent, and often with the express approval, of Congress, he must conclude that any attempt to confine its validity to particular reservations, or particular kinds of reservations, would be utterly vain. There is no principle upon which this can be logically done. As we have shown in our other brief, page 47 *et seq.*, reservations have been made for Indian occupancy, for military occupancy, for the public use of wood, timber, stone, and clay, for reservoir purposes, for bird protection, for projected national parks, for projected State parks, to enable Congress to grant land to a State for internal improvements, to enable Congress to grant land to a State through State selections, to enable Congress to

improve the law concerning the disposition of isolated tracts, to prevent frauds, etc. Frequently these reservations were approved by subsequent acts of Congress. All of the coal lands of Alaska were at one time withdrawn by the President; Congress, later, recognized his action. Water-power sites, phosphate land, coal land, asphalt land, gas land, and oil land have all been withdrawn, upon a tremendous scale. The withdrawals of oil lands from agricultural entry began some ten years before the act of June 25, 1910, was passed. And while all this process is going on we do not find a single note of disapprobation from Congress. The result is a general agency, so to speak. The Executive has assumed the right to make reservations whenever he deemed them advisable, for such public purposes as he considered proper. This is the right which Congress has recognized.

3. Even if the extensive practice of the last ten years or more were ignored, the present reservation, viewed as a reservation for a public use, would still fall fairly within the scope of the practice as it existed before.

(a) We have shown that the reservation is quite as closely allied to the President's statutory duties as are the military reservations. Indian reservations are analogous. No absolute necessity for an implication of authority attends these cases. The authority, however, may be implied, because it is harmless, convenient, and sometimes essential for the protection of the public interests, and a liberal construction is allowable in favor of the public.

(b) Little need be said of the defendants' suggestions that an immediate use must be in contemplation. As we have said, a future use may call for present protection as well as an immediate one. Reservation for future use may be quite as much required by the "exigencies of the public service" as reservation for immediate use. And it may be assumed as a matter of high probability that many of the past executive reservations occurred well in advance of the time of use.

(c) But it is urged that this reservation differs in that there was no right or intention to use the land without some further action by Congress.

The "exigencies of the public service," referred to by this court in *Grisar* v. *McDowell*, 6 Wall. 363, are not necessarily to be satisfied by such acts as the Executive is authorized to perform at the time when the exigencies arise. Some exigencies may be met by executive action alone, some by legislative action alone, and some only by a combination of both. If the exigency justifies the executive action *as far as that action goes*, the action will stand to that extent without regard to whether it could have gone further. If the military reservation considered in the *Grisar* case, instead of being made for immediate and permanent use, had been made tentatively, subject to the future action of Congress, it would have been none the less effective.

If, as this court held in that case, Congress has recognized the authority of the President to reserve lands for public use as the exigencies of the public

service require, the reason for the recognition must arise from the public interest in having the lands reserved, and the effect of the recognition is to make the President the judge of the necessity and to treat the process of reserving them as a legitimate executive function. The fact that the use in view may not be made without new legislation can have no bearing upon the existence of a public necessity for the use, nor affect the character of the act of reserving the lands.

VII.

The reservation should be upheld independently of the naval purpose.

To prevent fraud, injustice, and waste in the disposition of our national estate is in itself a high public purpose, and a reservation made with this object in view should be upheld if not in clear and unavoidable conflict with the will of Congress. We have shown that for a number of years it has been customary to withdraw vast areas in this way, and that Congress has never objected, but, in some cases, has actually approved. The act of June 25, 1910, though out of tenderness toward possible private rights it did not operate as a ratification, may properly be regarded as the culminating (though unnecessary) evidence of congressional acquiescence. In the light of all this, it may well be said that the practice was legitimated, if irregular in the beginning.

It is entirely misleading to speak of such an authority as though it meant in effect an independent power in the President to suspend and set aside the laws.

Laws in the proper sense can only be stayed or affected by other laws. Here, however, we have to deal with an act which is not strictly a law, but a mere offer of privilege. Prior to the enactment of the first mining law, in 1866, all minerals were reserved to the Government (defendants' brief, p. 111 *et seq.*), but notwithstanding that fact, we have seen mineral rights become vested in individuals through the mere silent acquiescence of Congress. In other words, the mineral land law and policy of the Government were altered, and, substantially, reversed, without an act of Congress. Surely it would require very little evidence of congressional consent to sustain the authority of the President now under discussion, especially when it is considered that the mining law is wholly consistent with the reservation of any amount of mineral land in the public interest. It is only by attributing to the President the purpose, and only the purpose, of defeating the mining law itself that his action may be made to wear the appearance of defying the will of Congress. But it is not credible that the mere temporary withholding of designated lands in order to prevent waste, fraud, and other newly ascertained abuses, until Congress might consider them, would be contrary to the intention of that body. The most that can be said is that Congress did not foresee such a situation and consequently did not provide for it when the mining law was passed. Therefore the temporary withdrawal, for the purposes indicated, would be objectionable, if at all, only

because not expressly allowed. We think that the public interest permits the implication of the authority to make such withdrawals, and that their propriety is established by the tacit approval of Congress.

CONCLUSION.

In this brief and in our opening brief the public use has been emphasized throughout, because we have thought that upon that ground the reservation may be readily and specifically sustained without a decision upon the broader question which we have just considered. All of the writers on mining law who touch upon the subject have conceded, either expressly or impliedly, the authority of the President to reserve mineral land for Indian and military purposes. (See 1 Snyder, secs. 189–192; Morrison, 14th ed., p. 388; Martin [,1908], secs.44, 46; Costigan, secs. 23, 24; Barringer and Adams, Vol. I, pp. 545, 547; Vol. II, pp. 568, 569; Lindley, Vol. I, sec. 181 *et seq.*, sec. 190 *et seq.*) There can be no serious question of the existence of that authority. But, once concede its existence, immediately it becomes impossible to say, judicially, where the power to reserve for public purposes must end. This fact, in connection with the broad practice of withdrawing lands for an indeterminate variety of purposes, and the strong negative and positive evidence of congressional approval, to our minds makes it evident that the remedy for an abuse, if any there be, of the executive authority should be by legislation and not by judicial interference. But in so far as this reservation may properly

be the subject of judicial scrutiny, it should be viewed from the public standpoint with due regard to its immense public importance, liberal presumptions should be allowed in favor of governmental convenience and in support of governmental action, and strict constructions should be avoided.

JOHN W. DAVIS,
Solicitor General.

ERNEST KNAEBEL,
Assistant Attorney General.

JANUARY, 1914.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1913

No. 278

THE UNITED STATES OF AMERICA,
Appellant,
vs.
THE MIDWEST OIL COMPANY ET AL.,
Appellees.

On Record Certified to the Supreme Court from the United States Circuit Court of Appeals for the Eighth Circuit on Appeal from the District Court of the United States for the District of Wyoming.

OPINION OF HONORABLE M. T. DOOLING, U. S. District Judge, in the case of The United States of America, Plaintiff, vs. Midway Northern Oil Company (a corporation) et al., Defendants, dated May 29, 1914.

PRESS PUBLISHING CO., SAN FRANCISCO.

In the Supreme Court
OF THE
United States

October Term, 1913

No. 750

THE UNITED STATES OF AMERICA,
Appellant,
vs.
THE MIDWEST OIL COMPANY ET AL.,
Appellees.

On Record Certified to the Supreme Court from the United States Circuit Court of Appeals for the Eighth Circuit on Appeal from the District Court of the United States for the District of Wyoming.

OPINION OF HONORABLE M. T. DOOLING, U. S. District Judge,

in the case of The United States of America, Plaintiff, vs. Midway Northern Oil Company (a corporation) et al., Defendants, dated May 29, 1914.

"In the District Court of the United States, in and for the Southern District of California, Northern Division, Ninth Circuit.

The United States of America, Plaintiff, vs. Midway Northern Oil Company (a corporation), et al., Defendants.	In Equity No. 47 Civil

MOTIONS TO DISMISS BILL.

The bill avers, in substance, that defendants subsequent to March 1st, 1910, entered upon the N. W. ¼ of Section 32, T. 12 N., R. 23 W., S. B. M., which was then, and ever since has been the property of plaintiff, and on June 6th, 1910, discovered therein petroleum in paying quantities; that on September 27th, 1909, the President regularly withdrew said land and the whole thereof from mineral exploration, and from all forms of location, settlement, selection, filing, entry or disposal under the mineral or non-mineral public land laws of the United States, and reserved the same for public uses, to wit: In order to secure a supply of fuel oil for the use of the navy, and that since said last mentioned date none of said land has been subject to exploration for minerals, or to the initiation of any right under any of the public land laws of the United States; that defendants are now extracting vast quantities of mineral oil

and petroleum from said lands, and committing waste and trespass thereon to plaintiffs' irreparable injury, and that defendants are so doing under the pretense that they have acquired valid mineral rights therein, by virtue of their entry upon said land and exploration and development thereof, and discovery of oil therein, but that by reason of such order of withdrawal of September 27th, 1909, such claim of right is unfounded. The bill asks for an injunction, a receiver, an accounting, and a decree that defendants have no estate, right or title to said land, or to any of the minerals contained therein, and that it be decreed that plaintiff has a perfect property in said land free and clear of any of the claims of defendants, and each and every of them.

The case turns upon the validity or invalidity of the executive withdrawal order of September 27th, 1909, which order is as follows:

"Temporary petroleum withdrawal No. 5."

"In aid of proposed legislation affecting the use and "disposition of the petroleum deposits on the public "domain, all public lands in the accompanying lists are "hereby temporarily withdrawn from all forms of loca- "tion, settlement, selection, filing, entry, or disposal "under the mineral or non-mineral public land laws. "All locations or claims existing and valid on this date "may proceed to entry in the usual manner after field "investigation and examination."

The accompanying lists embraced 3,041,000 acres of land, 170,000 acres thereof being in Wyoming, and 2,871,000 acres in California. Included in this latter quantity is the land described in the bill.

It will be observed that while the bill declares the purpose of the withdrawal to have been to secure for the navy a supply of fuel oil, the order itself makes no such declaration, but states the purpose to be "In aid " of proposed legislation affecting the use and disposi- "tion of the petroleum deposits on the public domain", and the history of the movement to secure such legislation indicates that the Executive was dissatisfied with the existing laws in regard to the disposition of petroleum deposits and hoped to have them changed. It may be added, too, that the bill as originally filed contained no reference to the use of oil by the navy, but that this averment was added by an amendment made on the very day that the motion to dismiss was called for argument, although the bill itself had been filed nearly a year before.

At the time of this withdrawal, and at the time of defendants' entry upon the land, there were in force, and still remain in force the following statutory provisions:

" That all valuable mineral deposits in lands belong- " ing to the United States * * * are hereby de- " clared to be free and open to exploration and pur- " chase, and the lands in which they are found to occu- " pation and purchase, * * * and that claims usu- " ally called 'placers' including all forms of deposit, " excepting veins of quartz or other rock in place, shall " be subject to entry and patent, under like circum- " stances and conditions, and upon similar proceed- " ings, as are provided for vein or lode claims."

"That any person authorized to enter lands under "the mining laws of the United States may enter and "obtain patent to lands containing petroleum or other "mineral oils, and chiefly valuable therefor, under the "provisions of the laws relating to placer mineral "claims."

It is under these statutes that defendants claim. The effect of the withdrawal order, if valid, was to suspend the operation of these statutes, at least to the extent of withholding their application to such portion of the 3,041,000 acres of land described as still remained a part of the public domain.

The Constitution, Article IV, Section 3, vests in Congress the power to dispose of and make all needful rules and regulations respecting territory or other property of the United States, and it was early decided that "the "term territory as therein used is merely descriptive "of one kind of property, and is equivalent to the word "lands; that Congress has the same power over lands "as over any other property belonging to the United "States; and that this power is vested in Congress "without limitation." U. S. v. Gratiot, 14 Peters 526. The same proposition is differently, but no less forcibly stated as follows in other cases: "No appropriation of "public land can be made for any purpose but by "authority of Congress." U. S. v. Fitzgerald, 15 Peters 407.

"But public and unoccupied lands to which the United "States have acquired title Congress, under the power "conferred upon it by the Constitution, has the ex- "clusive right to control and dispose of, as it has with

" regard to other property of the United States." Van Brocklin v. State of Tennessee, 117 U. S. 151.

" The Constitution vests in Congress the power to " ' dispose of and make all needful rules and regula- " 'tions respecting the territory or other property be- " 'longing to the United States'. And this implies an " exclusion of all other authority over the property " which could interfere with this right or obstruct its " exercise." Wisconsin R. R. Co. v. Price County, 133 U. S. 496.

" With respect to the public domain the Constitu- " tion vests in Congress the power of disposition and " of making all needful rules and regulations. That " power is subject to no limitations. Congress has the " absolute right to prescribe the times, the conditions " and the mode of transferring this property, or any " part of it, and to designate the persons to whom the " transfer shall be made." Gibson v. Chouteau, 13 Wall. 92.

Congress therefore having the exclusive power to dispose of the land in question, and to make all needful rules and regulations in relation thereto, and having declared the minerals therein to be free and open to exploration and purchase and the land itself to occupation and purchase, under the placer mining laws, the operation of such laws should not be interfered with by any other department unless a clear authority exist for such interference. It is claimed by plaintiff that such authority does exist, having its basis in long acquiescence by Congress in the exercise by the Executive of the power to reserve public lands for public pur-

poses, and in the approval by Congress of the exercise of this power in many instances other than the one in question. It is also claimed that such authority inheres in the Executive under the Constitution, subject only to the paramount authority of Congress. Many times the Executive has withdrawn lands in the past, and many times Congress has either directly or indirectly approved such withdrawals. Many times too Congress has affirmatively authorized such withdrawals in advance of their making. The right to make such withdrawals has also frequently been passed upon by the courts in concrete and specific cases. In many instances such right has been upheld, in others it has not. An examination of the adjudicated cases upon this point, however, seems to me to indicate that in every instance where the right to make such withdrawals was upheld in the absence of congressional authorization, either direct or clearly to be implied, it was either because the lands withdrawn were actually devoted to a specific public purpose before the right of any third person had intervened, or because such withdrawal was necessary in order fully to effect the purposes of some existing law. An example will serve to illustrate each of these classes of cases.

In Grisar v. McDowell, decided by the Supreme Court in 1867, the question involved a military reservation which had been long occupied by the government for military purposes, and was indeed actually in the possession of the government and used for such purposes at the time the controversy arose, and the court said:

"From an early period in the history of our govern-

"ment it has been the practice of the President to "order, from time to time, as the exigencies of the pub- "lic service required, parcels of land belonging to the "United States to be reserved from sale and set apart "for public uses. The authority of the President in "this respect is *recognized* in numerous acts of Con- "gress * * *. The action of the President in making "the reservations in question was indirectly approved "by the legislation of Congress in appropriating "moneys for the construction of fortifications and other "public works on them. The reservations made at the "same time embraced seven distinct tracts of land, and "upon several of them extensive and costly fortifica- "tions and barracks and other public buildings have "been erected." This case taken in its entirety does not seem to me to support the proposition that 3,000,000 acres of land may be withdrawn by executive order from the operation of the laws enacted by Congress specifically providing for its disposition.

The so-called Des Moines River Cases will illustrate the second broad class of cases in which withdrawal orders have been upheld. In 1846, for the purpose of aiding to improve the Des Moines River from its mouth to Racoon Creek, Congress granted to the Territory of Iowa certain lands, being one equal moiety in alternate sections on a strip five miles in width on each side of said river. A doubt soon arose as to whether this grant carried any of the lands along the river above Racoon Creek, and the first Secretary having to do with the question was of the opinion that the grant did embrace such lands, and consequently reserved them

from sale in order to carry out the law as construed by him. The validity of such reservation was before the Supreme Court in several cases, in each of which it was upheld, the court saying in one of them: "Besides, "if this power was not competent, which we think it "was ever since the establishment of the Land Depart- "ment, and which has been exercised down to the "present time, the grant of 8th August, 1846, carried "along with it by necessary implication, not only the "power, but the duty, of the land office to reserve "from sale the lands embraced in the grant * * * "That there was a dispute existing as to the extent of "the grant of 1846 in no way affects the question. The "serious conflict of opinion among the public authori- "ties on the subject made it the duty of the land office "to withhold the sales and reserve them to the United "States till it was ultimately disposed of." Wolcott v. Des Moines Co., 5 Wall. 681. One of the grounds therefore upon which the reservation was held to be valid was the necessity of preserving intact the full measure of the grant, and to this extent at least the reservation was made in order that the provisions of the law, if it should ultimately be determined that the lands above Racoon Creek were embraced therein, might be put fully into effect.

It has been held in later cases that the Executive has no general power to withdraw lands from the operation of existing laws. In Southern Pacific R. R. Co. v. Bell, 183 U. S. 675, the court says:

"The power of the Secretary to withdraw lands is "exercised for the purpose of carrying out the grant "to the railroad, and to prevent lands covered by said

" grant from being taken up by settlers before the road " is completed and patents issued to the company; but " clearly that power cannot be exercised to withdraw " lands which are beyond the intended limits of the " grant." So in Brandon v. Ard, 211 U. S. 11, where a grant was made in March, 1863, an attempted withdrawal in May, 1863, and a homestead settlement in June, 1866, over three years later, and when the withdrawal order, if effective at all, had been over three years in effect, the court speaking also of indemnity lands says again:

" We cannot give to the withdrawal from sale, pre- " emption or settlement of the lands upon which Ard " entered in 1866 the legal effect which the plaintiffs " in error insist must be given to it. It is conceded " that the lands were not within the place or granted " limits of either railroad, but were within indemnity " lands. The withdrawal of them from sale or settle- " ment * * * prior to the definite location of the " road, and before they were selected to supply defi- " ciencies in place or granted limits, was without " authority of law. Such unauthorized withdrawal did " not stand in the way of Ard, in virtue of his settle- " ment on them in 1866 under the then existing home- " stead laws, from acquiring such an interest in the " lands as would be protected against their subsequent " selection by the railroad company."

In a still later case the court again says:

" A rejection upon the ground stated was not author- " ized, for the Secretary of the Interior had no author- " ity to withdraw from settlement lands within the " indemnity limits of the grant which had not been

"before selected and approved by him." Osborn v. Froyseth, 216 U. S. 571.

It is clear therefore that no general power of withdrawal exists, and while withdrawal orders have been very frequently upheld, I find no case broad enough to cover the withdrawal of over 3,000,000 acres of land from the operation of the mineral land laws whether "in aid of proposed legislation" as stated in the order, or for the purpose of securing a supply of fuel oil for the navy as stated in the bill. I am fully aware of the importance of this and kindred cases because of the magnitude of the interests involved. But they are still more important because of the legal principles upon which they must be determined. The effect of the order of withdrawal of September 27th, 1909, whatever its purpose, was practically to suspend the operation of the mineral laws as applied to the petroleum deposits in the public domain. If such power exist, plaintiff should be able to point to some clear legislative or constitutional provision upon which it rests. I am not content to seek for it in the dicta of decisions, or in some shadowy twilight zone lying between the powers expressly granted to the Congress and the powers expressly granted to the President. The power to dispose of the public lands has been given to the Congress by the Constitution, and I find no conflicting power granted the President by that instrument derogatory to the power given the Congress in this regard. The Congressional will as to these lands is clearly expressed in the laws above cited, and the right to nullify this will is not lodged in either the executive

or judicial department. On the contrary it is equally the duty of the executive as of the judicial department to see that this will is carried into effect. The promulgation of the order in question I believe to be but one manifestation of a growing tendency to concentrate in the Executive more of power than can be traced to any specific constitutional or legislative provision. As this tendency in the present instance leads to an encroachment upon the domain of the Congress, I am unwilling to further it by any decree of this court, and for this reason it is ordered that the application for an injunction and a receiver be denied, and the bill itself dismissed.

May 29th, 1914.

M. T. Dooling,

Judge."

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. 278.

UNITED STATES, Appellant,

vs.

THE MIDWEST OIL COMPANY ET AL., Appellees.

BRIEF FOR AMICI CURIÆ BY PERMISSION OF THE COURT.

E. S. PILLSBURY,
OSCAR SUTRO,
ALDIS B. BROWNE,
ALEXANDER BRITTON,
EVANS BROWNE,
FRANCIS W. CLEMENTS.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 750.

UNITED STATES, APPELLANT,

vs.

THE MIDWEST OIL COMPANY ET AL., APPELLEES.

BRIEF FOR AMICI CURIAE BY PERMISSION OF THE COURT.

It would be idle to traverse the phases of this case discussed in the complete briefs filed by counsel of record. We have asked leave to file this brief as *amici curiæ* for the purpose of respectfully directing the court's attention to only one or two points.

SCOPE OF WITHDRAWAL ORDER OF SEPTEMBER 27, 1909, AS NOT INHIBITING OCCUPATION AND EXPLORATION OF MINERAL DEPOSITS IN LANDS BELONGING TO THE UNITED STATES.

By Section 2319, U. S. R. S.:

"1. All valuable mineral deposits in lands *belonging* to the United States, both surveyed and unsur-

ls

"veyed, are hereby declared to be free and open for "exploration and purchase."

"2. And the lands in which they are found to oc- "cupation and purchase."

Thus the right is granted to occupy for exploration and for exploitation of the mineral deposits without declared intention to acquire title in the lands in which the deposits occur.

> "It is very true that Congress has, by statutes and "by tacit consent, permitted individuals and cor- "porations to dig out and convert to their own use "the ores containing the precious metals which are "found in the lands *belonging to the Government,* "without exacting or receiving any compensation "for those ores, and without requiring the miner to "buy or pay for the land."
>
> *Forbes vs. Gracey,* 94 U. S., 762, 763.

Sections 2320 and 2335, U. S. R. S., specify the manner of initiating a claim and perfecting title to mineral ground. The first step in the proceeding looking to title is *location* of the ground claimed, but "no *location* of a mining claim "shall be made until the discovery of the vein or lode within "the limits of the claim located." Section 2320, U. S. R. S.

Even where title is sought occupation and exploration leading to discovery of the mineral substance must occur before location. This clear distinction between (1) the right of occupation and exploration of *mineral deposits,* and (2), the right to purchase or enter *mineral ground* must be kept in mind when the scope and effect of the withdrawal order of September 27, 1909, is considered. For this purpose the power and authority to make the order may be conceded *arguendo;* only the scope and extent of the order are in question.

The order, omitting the list of lands, reads:

> "In aid of proposed legislation affecting the use and "disposition of the petroleum deposits on the public "domain, all public lands in the accompanying lists

"are hereby temporarily withdrawn from all forms
"of location, settlement, selection filing, entry, or
"disposal under the mineral or non-mineral public-
"land laws. All locations or claims existing and
"valid on this date may proceed to entry in the usual
"manner after field investigation and examination."

In the first place the order does not by its terms include the mineral *deposits* in the lands named. Occupation or exploration for such *deposits* is not attempted to be withheld, if indeed this would have been possible, for by section 2319, U. S. R. S., the right of exploration for valuable mineral *deposits* is granted not only in the *public* lands, but "in "lands *belonging* to the United States." To concede the power to withdraw the *lands*, merely concedes the power to withhold *them* from sale or disposition. As before shown, exploration and even exploitation may be made of valuable mineral *deposits* "in lands *belonging* to the United "States" without a purpose on the part of the occupant to acquire title to the ground in which the deposits are found, and since the *lands*, even after withdrawal from purchase, do not cease to *belong* to the United States, this conclusion cannot be affected by such withdrawal.

How then can this order be construed as affecting the right of the prospector to explore and even exploit the valuable mineral deposits in the lands *belonging* to the United States?

The order of September 27, 1909, states its purpose to be "in aid of proposed legislation affecting the use and dispo-"sition of the petroleum deposits on the public domain." While there has been no legislation since the said order specifically "affecting the use and disposition of the petroleum "deposits on the public lands," Congress has, however, on the initiative of the Executive, who made the order, legislated respecting the matter of withdrawal of public lands.—Act of June 25, 1910.

By the provisions of section 2 of that act the distinction hereafter made between the right of occupancy for explora-

tion and discovery of the mineral *deposits* and the right to purchase the mineral *ground* is clearly recognized.

Section 2 of that act in providing "that all lands with-" drawn under the provisions of this act shall at all times be " open to *exploration, discovery, occupation* and *purchase,* " under the mining laws of the United States, so far as the " same apply to minerals other than coal, oil, gas and phos-" phates," clearly withholds *all* such rights so far as the same apply to deposits of coal, oil, gas and phosphates in lands "withdrawn under the provisions of this act."

We confidently urge, therefore,

1. That the order of September 27, 1909, did not prevent nor attempt to prevent occupation of the lands and exploration for mineral *deposits,* and

2. That until the act of June 25, 1910, no withdrawal of the mineral *deposits* in lands *belonging* to the United States from occupation and exploration was possible.

Congressional Autuority, Express or Implied, or at Least Congressional Acquiescence, Must Lie Back of Every Executive Order of Withdrawal.

The question whether or not by precedent and practice the Chief Executive may exercise the power of withdrawal is elaborately presented in the briefs. It is not disputed that to Congress belongs the power "to dispose of and make all needful rules and regulations" respecting the public lands. While something is said of the inherent power of the President to reserve public lands, no authorities are cited in support of such power, and it is apparently conceded that congressional authority, or at least congressional acquiescence, must lie back of every Executive order of withdrawal. The authorities cited in the brief for the appellant proceed on that assumption. Sometimes the authority is claimed to be found in an express congressional grant, sometimes in legislation in aid of an order already made, sometimes in an expressed or implied ratification. But always, under the

theory and language of the decisions relied upon by the appellant, there must be congressional authority, however deduced. Thus, for example, in Grisar *vs.* McDowell (6 Wall., 363) the court's dictum as to the Executive power to reserve lands is, in part, supported by the statement that "the action of the President in making the reservations in question was indirectly approved by the legislation of Congress in appropriating moneys for the construction of fortifications and other public works upon them."

So Attorney General MacVeagh, in the language quoted by appellant from his opinion (17 Op., 160), said: "Hence in reserving and setting apart a particular piece of land for a special public use, the President must be regarded as acting by authority of Congress." So, too, the opinions of Assistant Attorney General Van Devanter (29 L. D., 32), of Attorney General Miller (19 Op., 371), and of Attorney General Brewster (17 Op., 258), as shown by the language quoted by appellant, are based on the same theory.

Now the point here is that the congressional sanction, express or implied, without which there is no semblance of support to appellant's argument, was in this case denied.

Whatever may be claimed as to previous executive reservations, the consent of Congress to this order was expressly withheld. An implied authority cannot, it is submitted, be deduced where express consent is refused. In this case it was originally proposed that Congress should approve the order of September 27, 1909. The bill, which was afterwards known as the Pickett act, and which became a law on June 25, 1910, as it originally passed the House, contained a provision ratifying "all withdrawals heretofore made." (See Appendix, Exhibit 1.)

This provision of the bill was directly responsive to the message of the President, who urged upon Congress the approval of his order. The portion of the message dealing with the subject was much discussed in the debate on the bill (Congr. Rec., 61st Cong., 2d session, vol. 45, pt. 5, p. 5090), and is as follows:

> "The power of the Secretary of Interior to withdraw from the operation of existing statutes tracts of land, the disposition of which under such statute would be detrimental to the public interests, is not clear or satisfactory. This power has been exercised in the interests of the public with the hope that Congress might affirm the action of the Executive by laws adapted to the new conditions. Unfortunately Congress has not thus far fully acted on the recommendations of the Executive, and the question as to what the Executive is to do is, under the circumstances, full of difficulty. It seems to me that it is the duty of Congress now by statute to validate the withdrawals which have been made by the Secretary of the Interior and the President, and to authorize the Secretary of the Interior temporarily to withdraw lands pending submission to Congress of recommendations as to legislation to meet the conditions of emergencies as they arise."

The proceedings of the House on the date of the passage of the bill (April 20, 1910) demonstrate the purpose at that time to confirm the order here in question. The author of the bill said:

> "Mr. Chairman, within the limited time at my disposal I can only refer briefly to the main issue presented by the committee bill, the substitutes set forth in the minority reports, and which will, I am informed, be offered, and the more important amendments suggested during the progress of the debate.
>
> "The two important propositions contained in the bill are, first, conferring upon the President authority to make withdrawals of public lands for the purposes named, to wit, for public uses, for examination and classification, and when in his judgment public interest requires it to conserve the resources of our public domain, and, second, ratifying the withdrawals heretofore made."
>
> (Congr. Rec., *ibid.*, 5088.)

And the bill (H. R. 24070) went to the Senate with the desired clause of ratification.

But the Senate committee in charge of the bill struck out the clause. (Appendix, Exhibit 2.) At the same time the President's doubts as to the validity of the order were shared both in the House and Senate. Many Members and Senators considered the withdrawal unquestionably void. Thus Senator Borah, in the debate on June 7, 1910, when the Senate amendments were under discussion, said:

> "I agree perfectly with the Senator from Wyoming in his legal proposition that these withdrawals have been without authority of law; that they were in violation of law."
>
> (Congr. Rec., 61st Congress, 2d session, vol. 45, pt. 7, p. 7543.)

Nevertheless the Senate amendments, including that which struck from the bill the confirmation of the order, were concurred in by the House, and the bill, as returned to the House (Appendix, Exhibit 2), became a law.

The history of the act and disposition of the amendments which were offered to it are all matters germane to the intent of Congress and of judicial cognizance.

U. S. vs. Alexander, 12 Wall., 177.
U. S. vs. Burr, 159 U. S., 78.
Butterfield vs. Stranahan, 192 U. S., 470.
Jennison vs. Kirk, 98 U. S., 453.
Holy Trinity Church vs. U. S., 143 U. S., 457.

Thus, *e. g.*, in U. S. *vs.* Alexander, it was contended that the pension grant contained in the act of Congress of February 23, 1853, was effective from and after March 4, 1848. This court, in holding to the contrary, considered an amendment proposed to the act before its passage, and said:

> "And this is made quite certain by the history of the legislation. The act of 1855, when first proposed, contained the following provision: 'And the pensions granted by this act, and those under the said section of the act of February 3d, 1853, shall commence on the fourth day of March, 1848.' This provision was

> intended to change the construction which the Commissioner of Pensions had given to the act of 1853, but it was stricken out, and the statute was enacted as it now stands. The intention of Congress was thus clearly manifested to adopt the construction of the act of 1853, which had been given to it by the Pension Bureau, and we are hardly at liberty now to interpret it differently."

Not only *the history of the enactment of the statute* approved June 25, 1910, but *the provisions of the act,* completely negative the existence of congressional assent to the order of September 27, 1909.

That order provided that—

> *"in aid of proposed legislation* affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry or disposal *under the mineral or non-mineral* public-land laws. *All locations or claims* existing and valid on this date may proceed to entry in the usual manner after field investigation and examination."

But no authority is conferred by the act of June 25, 1910, for a withdrawal "in aid of proposed legislation." The power given to the President by that statute is to reserve lands "for water-power sites, irrigation, classification of lands or public purposes to be specified in the order of withdrawals." *Expressio unius est exclusio alterius.* Bearing in mind that the order of September 27, 1909, was constantly before Congress in the enactment of the statute of June 25, 1910, there is a studious avoidance in that act of any authority for, or approval of, a withdrawal "in aid of proposed legislation."

Still bearing in mind that the President's message requested ratification and approval of the Executive withdrawal of September 27, 1909, and that that withdrawal specified no public purpose, it is of marked importance that the act of June 25, 1910, requires that the exercise of the

President's power to withdraw must be accompanied by a specification of the purpose in the order of withdrawal. It is conceded that there is no statute conferring upon the Chief Executive the power generally to reserve lands, and the only general act of Congress on the subject is that of June 25, 1910. Measured by that statute, no withdrawal, past or future, could be valid unless the purpose thereof is specified therein.

Again, the act of June 25, 1910, expressly provides that all lands withdrawn by the President shall be open to exploration, discovery, occupation and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals. (Act of June 25, 1910, amended by act of August 24, 1912.) The order of September 27, 1909, on the contrary, withdrew the lands from all forms of location, entry or disposal under the mineral laws.

The withdrawal order reserved the land from all forms of settlement, selection, filing, entry or disposal under the mineral or non-mineral public land-laws. The act of June 25, 1910, on the contrary, provides that there shall be excepted from the force and effect of any withdrawal made under the provisions of the act, lands which at the date of such withdrawal are "embraced in any lawful homestead or desert entry theretofore made or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law." According to the terms of the withdrawal of September 27, 1909, no lawful homestead or desert entry or valid settlement could be made, or, if made, perfected, on any of the lands described in the order. Under the act of June 25, 1910, all such homestead or desert entries or other valid settlements could, on the contrary, be made up to the time of a withdrawal made pursuant to the statute.

The order of withdrawal provides that all locations or claims existing and valid at the date thereof may proceed to entry, and, by implication, purports to cut off the right of

purchase under the mining laws, of an occupant whose possession had not ripened into a location or claim. The act of June 25, 1910, on the contrary, expressly provides that the rights of a *bona fide* occupant or claimant of oil or gas-bearing lands, complying with the provisions of the statute, shall not be affected or impaired by a subsequent order of withdrawal.

In all these respects the provisions of the order of September 27, 1909, not only failed to receive congressional authority, but are directly contrary to the expressed will of Congress.

Again, section 2320, R. S., provides:

> "But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

Clearly, therefore, no right of purchase is acquired, nor is any claim in fact initiated under the mining laws as against the United States prior to actual discovery of a valuable mineral deposit within the limits of the claim located. However, by section 2 of the said act of June 25, 1910, it was provided that one in the *bona fide* occupation of oil or gas bearing land without *previous discovery* but in diligent prosecution of work thereon at date of withdrawal "shall not be affected or impaired by such order" so long as he shall diligently prosecute the work towards actual discovery, and this protection or grant of right was specifically made applicable to the lands attempted to be previously withdrawn by Executive order. Congress therefore not only withheld its assent to or acquiescence in the previous executive withdrawal of mineral lands, all of which claims would have been terminated had such assent been given, but, on the contrary, conferred rights upon these inchoate claims, even as against a possible recognition of such withdrawal by the courts. Finally, this act also expressly provides that it shall not be construed as a

recognition, abridgment or acknowledgment of any "asserted rights" or "claims" upon oil or gas bearing lands after a withdrawal made *prior* to the passage of the act, though such asserted rights or claims would obviously be in derogation of the prior executive withdrawal.

Thus there is no congressional assent, express or implied, to be found to support the executive withdrawal of September 27th, 1909. Congressional assent to or acquiescence in that withdrawal was purposely withheld in the passage of the act of June 25th, 1910, the express provisions of which are not only repugnant to the terms of the order for such withdrawal, but to the purpose and effect thereof surely as applied to the rights of mineral claimants.

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